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FEDERAL COURT AND JUSTICIABLE DISPUTES UNDER THE GOVERNMENT OF INDIA ACT, 1935.

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I. Appellate Jurisdiction of Federal Court—Justiciable Disputes

Disputes will come up for decision before the Federal Court either in the exercise of its original jurisdiction or appellate jurisdiction. In the 2nd discourse, it was pointed out that controversies in which a dispute involves a legal right between the various constituent units as provided under S. 204 (cl. 1) are decided by the Federal Court in the exercise of original jurisdiction. In India, disputes from provinces involving substantial questions relating to the interpretation of the Government of India Act of 1935 or order in Council might come up in appeal before the Federal Court on the grant of a certificate by the High Court as prescribed under S. 205 of the Act. Similarly an appeal lies to it from the High Court of a Federated State on questions, involving the interpretation of this Act or order in Council or involving the extent of the legislative or executive powers vested in the Federation by virtue of the Instrument of Accession of that State or on questions, arising under an agreement under Part VI regarding the administration in that state of a Federal Law. In the United States of America in every district there is a district Federal Court functioning side by side with a state court. All disputes between the constituent units of the Federation and disputes involving questions of constitutional importance will be decided by the Federal District Court and by the Federal Court of Appeal. And if the parties are not satisfied, a final appeal to the Supreme Court is provided for.

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Under the Government of India Act of 1935 questions of *ultra vires* regarding a legislation would arise, if one legislature unwittingly or otherwise intrude upon the province of the other. These questions will come up for solution in appeal before the Federal Court, in spite of the care taken in the allocation of powers between the Federation and the Provinces. As Lord Sankey said in another connection,

"the cases which have to be decided will be legion. Many inquests will have to be held on these three lists and many great lawyers have from time to time dissect them." *See* In re *Regulation and Control of Aeronautics in Canada*, (1932) A.C. 54.

II. Distribution of legislative powers

In the Constitution of the Commonwealth of Australia, the plan adopted has been to specify exhaustively to the Federal legislature, and to assign to the provincial legislature the whole of the unspecified residue. In the constitution of the Dominion of Canada, under the North America Act of 1867, the Provinces were given legislative powers on certain enumerated topics, the Parliament of Canada reserving to itself all residuary powers. Whereas under the Commonwealth Act of 1900, the states enjoy the residuary powers, the Commonwealth Parliament exercise powers of legislation over only thirty-nine enumerated subjects. This kind of distribution of powers between the federal and provincial legislatures proved to be a prolific source of litigation on the question whether a piece of legislation falls within the competence of the enacting legislature or not. Often this unsatisfactory state of things was aggravated by the courts sticking to the letter of the law and failing to carry out its spirit. *The Toronto Electric Commissioners* v. *Snider*, (1925) A.C. 396, is an instance of the kind. Under S. 92 (13), the province is given the right to legislate on matters affecting "property and civil rights in the provinces." The Dominion Parliament enacted the Industrial disputes Investigation Act, 1907, which provided that upon a dispute arising between the employers and employees the minister for labour in the Dominion might appoint a Board which is to report after investigation with recommendation as to fair terms. The report was not binding, but satisfied the parties. After reference to a Board, the strike was to be unlawful. The measure worked satisfactorily. But in 1918, the measure was challenged and the Privy Council held that the Act was not within the competence of the Dominion Parliament and that it related to property and civil rights in the provinces, a subject reserved to the Provincial legislature. To circumvent such difficulties arising in India, in

the distribution of legislative powers, a concurrent list was prepared under the Government of India Act, 1935.

II. (a) Experience in Canada and Australia

The members of the Select Committee in their report Vol. I take note of this difficulty and observe at p. 30 as follows:—

"Experience has shown both in India and elsewhere that there are certain matters which cannot be allocated exclusively either to a central or provincial legislature, and for which, though it is often desirable that provincial legislature should make provision it is equally necessary that the Central Legislature should also have a legislative jurisdiction, to enable it in some cases to secure uniformity in the main principles of law throughout the country, in others to guide and encourage provincial effort, and in others again to provide remedies for mischiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province. Instances of the first are provided by the subject-matter of the Great Indian Codes, of the second of such matters as labour legislation, and of the third by legislation for the prevention and control of epidemic disease. It would in our view be disastrous if the uniformity of law which the Indian Codes provide were destroyed or whittled away by unco-ordinated action of Provincial Legislature. On the other hand local conditions necessarily vary from province to province. Therefore a new device was introduced by creating a concurrent list including certain subjects on which both the Federal and the Provincial Legislature can enact."

II. (b) The three lists in Indian Federation—Results

The result of this statutory allocation of exclusive powers will be to change fundamentally the existing relations between the centre and the Provinces. Under the Government of India Act of 1915-1919, the Central Legislature has the legal power to legislate upon any subject, even though it be classified under by-rules under the Government of India Act as a Provincial subject, and a Provincial legislature can summarily legislate for its own territory on any subject, even though it be classified as a central subject; for the Act of each of the Indian Legislature, central or provincial, requires the assent of the Governor-General, and that assent when given, S. 84 (3) of the Government of India Act of 1915 and S. 16 (2) of the Government of India Act of 1919, provide that the validity of any act of the Indian Legislature or any local legislature shall not be open to question in any legal proceedings on the ground that the Act affects a Provincial subject or central subject as the case may be.

III. Ultra vires

But under the Government of India Act, 1935, an enactment on a matter included exclusively in the Federal list will be valid only if it is passed by the Federal Legislature; and an enactment on a matter included exclusively within the provincial list will be valid only if it is passed by the provincial legislature; and to

the extent to which one legislature invades the province of the other, its enactment will be *ultra vires* and void. *Vide* Ss. 99 and 100 of the Government of India Act of 1935. The courts will have to determine in a given case whether or not a legislature has transgressed its limits.

The questions which may arise as to the validity of legislation in the concurrent field are no less difficult of solution. Though it is necessary for the centre to possess in respect of subjects included in the list a power of co-ordinating or unifying regulation, the subjects themselves are essentially provincial in character and will be administered by the Provinces and mainly in accordance with provincial policy. At the same time, it is clear that if the concurrent legislative power at the centre is to be effective in such circumstances, the normal rule must be that, in case of conflict between a central and a provincial act in the concurrent field, the former must prevail. But an unqualified provision to that effect would enable an active centre to oust provincial jurisdiction entirely from the concurrent field and would thus defeat one of the main purposes of the latter. S. 107 of the Government of India Act of 1935 is intended to remove this difficulty. It lays down (1) that if a Provincial law is repugnant to any Federal law or any existing Indian law with respect to matters enumerated in the concurrent list, the Federal law will prevail and the provincial law shall be void to the extent of repugnancy. (2) But if the provincial law relating to one of the matters in the concurrent list is repugnant to the provisions of an existing Federal law or Indian law with respect to that matter and if it having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall prevail in that Province. But nevertheless the Federal Legislature may enact further legislation or make any amendment with respect to that matter repugnant to that provincial law, provided the previous sanction of the Governor-General in his discretion is obtained. (3) If any law passed by a Federated State is repugnant to a Federal law which extends to that State the Federal law, whether passed before or after the law of that State shall prevail, and the law of that State shall, to the extent of the repugnancy, be void.

IV. Residuary power

In spite of the abundant care exercised by the draftsman in the allocation of powers to the Federal and Provincial Legislatures under the Federal, Provincial and concurrent lists, it is inevitable that certain residue of subjects must remain un-

noticed; or new subjects non-existent or subjects unallocated might come to notice in course of time. In such cases the Governor-General in his discretion, may by public notification authorise the Federal Legislature or the Provincial Legislature to enact laws relating to them, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or the Province may extend to such law under S. 104 of the Government of India Act.

V. Precedents of Guidance

In the decision of constitutional disputes that are likely to come up before the Indian Federal Court on account of the laws enacted by the respective legislatures, the following precedents may be accepted as valuable guides in their interpretation and application. (1) The construction of the Statute shall not be literal, but shall be liberal and consonant with the spirit of the enactment. In this connection, it is worth recollecting the eloquent eulogy by Bryce to the worn of Chief Justice Marshall in bringing to light the implied powers of the American Constitution. Bryce, in his American Constitution (3rd Edn., 1895, Vol. I, p. 335), says:—

> "Had the Supreme Court been in those days possessed by the same spirit of strictness and literality which the Judicial Committee of the Privy Council has recently applied to the construction of the British North America Act, 1867, the United States Constitution would never have grown to what it is now."

We are aware that

> "Under the English system, decided cases effectively construe the words of an act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the Statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment. To borrow an analogy, there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced and not to allow general phrases to obscure the underlying object of the Act which was to establish a system of Government upon essentially Federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed." See *The Regulation and Control of Aeronautics in Canada*, In re, (1832) A.C. 54 at 70.

(2) It has to be borne in mind that the Indian Federal Legislature and the Federated States Legislature, and the Provincial Legislature have, subject to S. 110 of the Government of India Act, plenary powers and are not delegates of or

acting under any mandate from the Imperial Parliament or from the Federal Legislature as the case may be. The words of Lord Selborne in *Queen* v. *Burah,* (1878) 3 A.C. 889, applies to the Legislatures under the Government of India Act of 1935:

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

(3) The legislation, so long as it is within the limits of the Federal and Provincial legislature may not be questioned even if it is in contravention of the acknowledged principles of international law and it cannot be challenged as *ultra vires.* It may be that the legislation of the Federal Legislature may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the Government of India Act of 1935 has not conferred on the Federal or Provincial Legislature power to enact contrary to those principles. In *Croft* v. *Dunphy,* (1933) A.C. 156, the question raised before the Privy Council was whether the Parliament of Canada could pass a Customs Act under S. 91 of the British North America Act, conferring right on a Canadian customs officer to catch and bring to seashore any vessel found hovering with dutiable goods within a distance of 12 miles from the seacoast. A vessel belonging to the respondent in Nova Scotia and going out to the sea was caught at a distance of 11½ miles from the seashore by the Canadian customs officers. One of the defences raised by the respondent was whether the Parliament of Canada has the power to pass a law extending to more than 3 miles from the seashore as it is contrary to the rules of international law. This contention was overruled by Lord Macmillian holding that the Parliament of Canada is not under any such disability. Once it was found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate, their Lordships saw no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislature of a fully sovereign state.

(4) In deciding between the competency of the Federal and Provincial legislatures, the following four guiding principles laid down by the Privy Council in *Attorney-General for Canada* v. *Attorney-General for British Columbia,* (1930) A.C. 111 at 118, may equally be applied to the Indian Federation with necessary alterations:

(*a*) The enactments by the Federal Legislature, as long as it relates to subjects of legislation expressly enumerated in the Federal List is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislature by the Provincial list. Vide *Tennant* v. *Union Bank of Canada,* (1894) A.C. 31. For example, in *Cushing* v. *Dupuy* (1880) 5 App. Cas. 409. An Act relating to bankruptcy, passed by the Parliament of Canada, was objected to as being *ultra vires,* in so far as it interfered with property and civil rights in the province: but inasmuch as "bankruptcy and insolvency" form one of the classes of matters enumerated in S. 91, their Lordships upheld the validity of the statute. Sir Montague Smith pointed out that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property.

(*b*) The power of legislation conferred on the federation by the concurrent list, in supplement of the power to legislate upon the subjects expressly enumerated in the Federal list must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench upon any of the subjects within the scope of the Provincial Legislation unless the matters have attained such dimensions as to affect the body politic of the Federation. Compare *Attorney-General for Ontario* v. *Attorney-General for the Dominion,* (1896) A.C. 348.

(*c*) It is within the competence of the Federal Legislature to provide for matters which, though within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Federal Legislature upon a subject of legislation expressly enumerated in the Federal list. See *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada,* (1894) A.C. 189.

(*d*) There can be a domain in which provincial and federal legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear; but if the field is not clear and the two legislations meet, the Dominion legislation must prevail. See *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada,* (1907) A.C. 65; *La Compagnie Hydraulique De St. Francois* v. *Continental Heat and Light Company,* (1909) A.C. 194; In re *Silver Brothers, Ltd.,* (1932) A.C. 514, 529 and *Attorney-General for Canada* v. *Attorney-General for British Columbia,* (1930) A.C. 111 at 118.

(5) The Federal Legislature cannot interfere with the subjects given exclusively to the Provincial legislature under some colour or pretext. The courts must ascertain the true nature and character of the enactment, its "pith and substance" and it is the result of this investigation, not the form alone which the Statute may have assumed under the hand of the draftsman, that will determine within which of the categories of subjects in the legislative list the legislation falls; and for this purpose the legislation must be "scrutinised in its entirety". See *Attorney-General for Ontario* v. *Reciprocal Insurers,* (1924) A.C. 328 at 337. So also a Provincial Legislature cannot by pretending to legislate for the province intrude upon the Federal field and legislate. *John Deere Plow Company* v. *Wharton,* (1915) A.C. 330.

(6) The three legislative lists distribute all subjects of legislation between the Federal and Provincial legislatures. In assigning legislative power to the one or the other of these provinces it is not made a statutory condition that the exercise of such power shall be, in the opinion of the court of law, be discreet. In so far as they possess legislative jurisdiction, the discretion committed to the federal or provincial legislature is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them: but, when that point has been settled, courts of law have no right whatever to enquire whether jurisdiction had been exercised wisely or not. Vide *Union Colliery Company of British Columbia* v. *Bryden,* (1899) 24 A.C. 580.

(7) The first step to be taken with a view to test the validity of an Act of the Provincial Legislature is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in the provincial or concurrent list. If it does not then the Act is of no validity. If it does, then the further question may arise,

> "whether notwithstanding that it is so the subject-matter of the Act does not also fall within the enumerated classes of subjects in the Federal list and whether the power of the provincial legislature is or is not overborne".

Vide *Dobie* v. *The Temporalities Board,* (1882) 7 App. Cas. 136 at 149 and *Citizens Insurance Company of Canada* v. *Parsons,* (1882) 7 A.C. 96. Conversely in determining the validity of a Federal Act, the first question to be decided is whether the Act falls within the Federal list or concurrent list. If it does not, then the Act is of no validity. If it does, then the further question

may arise, *viz.*, whether notwithstanding that it is so, the subject-matter does not also fall within the enumerated classes of subjects in the provincial list. In such a case the rule enunciated in *Citizens Insurance Co. of Canada* v. *Parsons* and *Queen Insurance Co.* v. *Parsons,* (1881) 7 A.C. 96 at 108, may be followed. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist and in order to prevent such a result, the three lists must be read together, the language of the one interpreted, and where necessary, modified by that of the other. In this way, it may be, in most cases, found possible to arrive at a reasonable and practical construction of the language of the list, so as to reconcile the respective powers they contain and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

(8) Although part of an Act, either of the Federal Legislature or of a Provincial Legislature, may be *ultra vires* and therefore invalid, this will not invalidate the rest of the Act, if it appears that the one part is separate in its operation from the other part, so that each is a separate declaration of the legislative will, and unless the object of the Act is such that it cannot be obtained by a partial execution. And, in the same way, an Act may be *ultra vires* in some of its applications and *intra vires* in others. *Attorney-General for Ontario* v. *Attorney-General for Canada,* (1925) A.C. 750. Vide also *Toronto Corporation* v. *York Corporation,* (1938) A.C. 415.

VI. Legislative Power and Proprietary Rights

It will be apparent from Schedule VII of the Government of India Act of 1935 that Legislative powers are distributed between the Federal and Provincial Legislatures, and the residuary powers of legislation not included in the three lists are vested in the Governor-General under S. 204. But there is a vast distinction between legislative jurisdiction and proprietary rights. The fact that jurisdiction over a particular subject is conferred upon the federal legislature, for example, affords no evidence that any proprietary rights over it were transferred to the Federal Government. There is no presumption that, be-

cause legislative jurisdiction was vested in the Federal Legislature, proprietary rights were transferred to the Central Government. The Indian Federation came into existence under the Government of India Act of 1935. Whatever proprietary rights were at the time of the passing of the Act possessed by the Provinces remained vested in them, except such as are by any of its express enactment transferred to the Federation. *Vide* per Herschell in the Fisheries cases, *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia,* (1898) 23 A.C. 700 at 709 and *Cathering Milling and Lumber Co.* v. *The Queen,* (1888) 14 A.C. 46. In the *Fisheries case,* (1898) 23 A.C. 700, the question was whether under item 12 of S. 91 over "seacoast and Inland fisheries", the Dominion Parliament had jurisdiction to authorise the giving by lease, license, or otherwise to lessees, licensees or other grantees, the right of fishing in fisheries which before the Act vested in private individuals or in the provinces. Their Lordships hold that it has not, for S. 91 of the British North America Act did not convey to the Dominion any proprietary rights in relation to fisheries; and they drew attention to the distinction which must be borne in mind between rights of property and legislative jurisdiction. So also the power of the Federal Legislature over "navigation" does not enable it to claim property in the bed, or waters of the river. *Montreal Corporation* v. *Montreal Harbour Commissioners,* (1926) A.C. 299. But the Privy Council must not be understood as meaning that under its power to legislate in relation to Federal subjects, such as Federal Railways, the Federal Parliament cannot provide for the expropriation of lands, for example, for this legislative power necessarily implies such a right to interfere with private property, and even with provincial crown lands. Vide *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.,* (1906) A.C. 204. Again in the Fisheries cases, the Privy Council takes occasion to say that the power to legislate in relation to fisheries does, necessarily to a certain extent, enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose, might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is entirely left to the Dominion Legislature.

So also, although navigable waters may be regarded as the public property of the nation when the matter of maintaining

their navigability is concerned, and is a Federal subject for purposes of legislation, the Federal Government has no proprietary rights in them; nor does its sovereignty extend over them to the exclusion of the states or provinces in which they are situated. Thus apart from maintaining or promoting their navigability and of regulating navigation thereon, the Federal Government has no authority to exercise municipal jurisdiction over them, or to claim a property interest in their beds or banks, or to assert riparian rights in their waters, except of course, in so far as the Federal Government may itself happen to be the owners of lands through which waters may flow. In other words, the Federal Government may exercise an authority over these waters only in so far as inter-state or inter-provincial or foreign commerce, including the maintenance and promotion of their navigability, is concerned. See *Kansas* v. *Colorado,* 206 U.S. 46, where on the contention of the Federal Government that it might appropriate state waters to irrigate its own lands, the Supreme Court said:

> "It is enough for the purpose of this case to say that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. The state may determine for itself whether the common law rule in respect to riparian rights or that doctrine of the appropriation of water for the purpose of irrigation shall control".

Again in the case of *International Bridge and Co.* v. *New York,* 254 U.S. 126, the extent of the jurisdiction of the state over a bridge constructed with the sanction of the United States was involved. The case related to an international bridge with one of its *termini* in the State of New York and the other upon the Canadian soil. The State of New York sued the Bridge Company to recover penalties for failure to comply with certain requirement of a law of the State. The bridge was originally constructed under state authority. The Supreme Court held that the sanction for its construction as a lawful bridge did not exclude the control of the state over it. The Court said "The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. The State was the source of every title to that land and of every right to use it. The nature and qualifications of ownership are decided by the State and although certain supervening uses consistent with those qualifications cannot be interfered with by the State, still the foundation of a right to use the land at all must be laid by State law. No doubt in the case of an international bridge the action of a State will be scrutinised in order to avoid any possible ground for complaint, but the mere

fact that the bridge was of that nature would not of itself take away the power of the State over its part of the structure.

VII. Disputes from Legislation.

We shall now consider the disputes that are likely to arise with regard to subjects within the list: and illustrate some of them by parallel instances that came before other Federal Courts. *Disputes relating to waters and incidental rights* may be taken up for consideration first. These disputes may be grouped (using the very language of the lists) under I. (*a*) Maritime Shipping and Navigation, including shipping and navigation on tidal waters and admiralty jurisdiction., (*b*) Major Ports, that is to say, the declaration and delimitation of such ports and the constitution and powers of Port authorities therein. (*c*) Fishing and fisheries beyond territorial waters. (*d*) Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft. (*e*) Carriage of passengers and goods by sea. II. Water, that is to say, water-supplies, irrigation, canals, drainage and embankments, water-storage and water power. III. Shipping and navigation on inland waterways as regards mechanically propelled vessels and the rule of the road on such waterways: and carriage of passengers and goods on inland waterways. No. I will fall within the exclusive competence of the Federal Legislature, No. II within the competence of the Provincial Legislature and No. III within the competence of both the Legislatures concurrently. Here it is possible only to suggest the nature of some of the disputes likely to come up before the Federal Court either in its original side (if it arises between the constituent units, or between them and the Federation) or in its appellate jurisdiction on appeals from different High Courts. Of these, we shall deal with disputes that might arise out of maritime shipping and Navigation, etc., and fishing and fisheries, etc.

VII. (a) Maritime shipping and Navigation including shipping and Navigation on tidal waters—Admiralty Jurisdiction

Maritime shipping would seem to mean the right to prescribe laws and regulations for vessels navigating the waters of the Federation.. It would seem to relate to such matters as the law of the road, lights to be carried, how vessels are to be registered, and also to relate to evidence of ownership and title, transmission of interest and such matters. *See* Leofroy's Constitutional Law of Canada, p. 106. This power entitles the Federal Legislature to declare what shall be deemed an interference with

navigation. *See* the *Fisheries case*, (1898) A.C. 700 at 717. But concurrent powers of legislation are given to the Federal and Provincial Legislatures to legislate over "shipping, navigation over inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways." And to the Provincial Legislature is given the right to legislate over inland waterways and traffic thereon subject to the provisions of the concurrent list, referred to above with regard to such waterways. The public right of navigation and shipping in the sea and the tidal waters is thus exclusively within the competence of the Federal Legislature. But the provincial legislature has got power under the concurrent list to enact for the incorporation of navigation companies whose operations are limited to the provinces. The Provincial Legislature may have the power to regulate traffic from port to port in one and the same province, subject to any regulation on quarantine by the Federal authority. The regulation of inland waterways and traffic is left exclusively to the provincial legislature. The Federal Legislature cannot create a public right of navigation over provincial crown lands covered by water where no public right of navigation now exists. *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario, etc.*, (1898) A.C. 700 at 712. Accordingly, it was held in *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*, (1906) A.C. 204 at 209, where a harbour was crown-property and used for harbour purposes as the landing of goods and the like, the Dominion Parliament can legislate for harbour-purposes as the foreshore belongs to the crown.

VII. (aa) Admiralty Jurisdiction

There is no special section in the Government of India Act of 1935 expressly conferring admiralty jurisdiction upon the Federal Court. But S. 204 of the Act confers upon that Court to decide cases between the constituent units where the dispute involves any question of law or fact on which the existence or the extent of a legal right depends. Further, item 21 of the Federal list in Schedule VII confers upon the Federal Legislature power to enact laws relating to the admiralty jurisdiction. The High Courts of various provinces are given admiralty jurisdiction by their charters. Under the Colonial Courts of Admiralty Act of 1890 (53 & 54 Vic., c. 27) the Legislature of British India may declare certain Courts to be Colonial Court of Admiralty and the Courts so declared have the admiralty jurisdiction described in the Act. Under this power the Legislature of India

has by Act XVI of 1891, S. 2 declared the High Courts at Calcutta, Madras and Bombay as well as the Courts of the Recorder at Rangoon now the High Court at Rangoon, the Court of the Resident at Aden, and the District Court of Karachi to be Colonial Courts of Admiralty. And as maritime disputes between the constituent units are not triable by the High Courts, it is apparent that the Federal Courts is the only Court competent to decide such disputes.

VII. (b) What subjects triable in Admiralty side of Federal Courts

What subjects might fall to be decided by the Federal Court in its admiralty jurisdiction is a matter purely of maritime law. In *The Belfas*, (1868) 7 Wallace 624 at 627, the Supreme Court of the United States has described the admiralty and maritime jurisdiction as follows:—

> "Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizure on water for municipal and revenue forfeiture."
>
> "(1) Contracts, claims or service purely maritime and touching rights and duties appertaining to commerce and navigation, are cognisable in admiralty.
>
> (2) Torts or injuries committed on navigable waters, of a civil nature, are also cognisable in the admiralty Courts. "Jurisdiction in the former case depends upon the nature of the contract but in the latter it depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable are not maritime any more than those made to be performed on land. Nor torts cognisable in the admiralty unless committed on waters within the admiralty and maritime jurisdiction as defined by law."

As the Federal Legislature may regulate navigation, it may regulate the construction or maintenance of bridges over tidal navigable waters. In the absence of any Federal Legislation a province or a state may authorise the construction of a bridge over a tidal navigable stream, but the Federal Legislature may at any time interpose and require the alteration or removal of such a bridge. Those who act under the authority of the province or state necessarily assume the risk of Federal intervention and the consequent destruction of their property without compensation. See *Newport and Cincinati Bridge and Co.* v. *United States*, 105 U.S. 470 and *Willamette Iron Bridge and Co.* v. *Hatch*, 125 U.S. 1.

VII. (c) Fishing and Fisheries

The Federal Legislature has got the right to legislate for fishing and fisheries beyond the territorial waters and the Pro-

vincial Legislature has got the right to legislate for fishing and fisheries within the territorial and inland waters. The right of fishing in the sea is a right of the public in general and does not depend on any proprietary right and the Federal Legislature has the exclusive right of legislation in regard to it. See *Attorney-General of British Columbia* v. *Attorney-General for Canada,* (1914) A.C. 153 at 173. From the discussion regarding territorial waters in the second discourse it follows that the limit of the territorial waters from the low water mark is not settled, though the Territorial Waters Jurisdiction Act enacts that for crimes committed at sea, the jurisdiction of the maritime state extends up to 3 miles into the sea from the low water mark. Though for other disputes the 3 mile-limit may not be assented to by independent nations it may be accepted as a rule of guidance to settle the disputes between the constituent units of the Federation or between the Federation and the said units, in the absence of any special definition of territorial waters by the Federal Legislature extending it beyond the 3 mile-limit. Let us next consider the dispute that might arise out of legislation on Trade and Commerce, in some of their various forms.

VIII. (a) Trade and Commerce

Trade and Commerce form a subject, equally important in creating justiciable disputes. Only the Provincial legislature has power to legislate for trade within the province, and not for trade and commerce between the provinces or states. That is, its power is confined to intra-state as distinguished from interstate trade and commerce. Only the Federal legislature has power to legislate over interstate trade and commerce. Any provincial legislation purporting to be on intra-state trade and commerce but touching interstate trade and commerce will to that extent be *ultra vires.*

VIII. (b) Involve Profit

A fair interpretation of the term "commerce" would seem to require that in order to bring a transaction within it there would have to be involved at some point a commercial element, that is, one of trade or exchange of goods or of services made or rendered *for profit. Citizens Insurance Co. of Canada* v. *Parsons* and *Queen Insurance Co.* v. *Parsons,* (1881) 7 A.C. 96. But Marshall, C.J., in the Supreme Court of America seems to have expressed an *obiter* in *Gibbons* v. *Ogden,* 9 Wheat 1, that commerce need not involve any profit and that mere intercourse will do. But in later cases this *obiter* was not

followed. Willoughby in his Constitutional Law of the United States, Vol. II, p. 374, says:—

"In order that a transaction may be said to be one of commerce, and if crossing state lines is interstate commerce, there must be involved some element of trade or business for financial profit, it seems that one answer can reasonably be given. There must be such an element. This element may enter in any one of a number of ways. If a carrier for hire is involved that is sufficient, whatever be the purpose for which the persons or commodities are carried. If a person proceeds upon his legs, or is carried in his own or any other private vehicle which is not a common carrier, there is no commerce whatever may be the purpose of the going. If goods are carried by a person upon his own legs or in a private vehicle, or if as in the case of sheep they are driven on their own legs, the operation or transaction is a commercial one only if the goods or living beings are being moved for the purpose of selling or using them for financial profit or to effect delivery under such a sale or agreement for their use".

I shall now refer to some of the cases that arose out of the meaning of the term "commerce".

VIII. (b) (i) Navigation is Commerce

In the United States of America, a dispute arose in *Gibbons* v. *Ogden,* 9 Wheat 1, whether Navigation is commerce and it has been held that it is Marshall, C.J., said:

"The counsel for the appellee would limit it to traffic to buying and selling or to the inter-change of commodities and does not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic but it is something more. It is intercourse. The word comprehends and has always been understood to comprehend navigation within its meaning. Transportation of persons is held to be commerce".

VIII. (b) (ii) Insurance not Commerce

The writing, selling and transmission of insurance policies has been held not to be commerce. Issuing a policy of insurance is held to be not a transaction of commerce. The question arose in *Paul* v. *Virginia,* 8 Wall. 168 (reported in Evan's cases on American Constitutional Law, 3rd Edn., p. 498):

"The Legislature of Virginia passed an act providing that no insurance company not incorporated in that State should carry on its business without first depositing certain bonds of a specified character with State treasurer and receiving a license to do business. The agent of an insurance company incorporated in New York carried on business in violation of the Statute. The agent was convicted; one of the defences set up was that as the Statute of Virginia was a regulation of interstate commerce, that State had no power to enact and that the Statute is void. The Supreme Court held that the act is valid, as issuing a policy of insurance is not a transaction of commerce and hence not interstate commerce but only a local act. The policies are simple contracts of indemnity against loss by fire, entered into between the Insurance Co. and the assured, for a consideration paid by the latter. These contracts are not articles of commerce, in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of

the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. They are local transactions and are governed by the local law. They do not constitute a part of the commerce".

The same conclusion was arrived at by the Judicial Committee of the Privy Council in *Citizens Insurance Co.* v. *Parsons,* (1881) 7 A.C. 96. Sir Montague Smith says at p. 111:

"Is the business of insuring buildings against fire a trade? This business when carried on for the sake of profit, may, no doubt, in some sense of the word be called a trade. But contracts of indemnity made by insurers can scarcely be called trading contracts, nor were insurers who made them held to be "traders" under the English Bankruptcy law".

VIII. (b) (iii) Correspondence schools, Commerce

Correspondence schools giving instruction to students of various provinces or states would fall under the jurisdiction of Federal Legislature and any legislation by the provincial legislature affecting them would not bind them.

In *International Text Book Co.* v. *Pigg,* 217 U.S. 93 decided in 1910, the United States Supreme Court held that the conduct of a "correspondence school" is interstate commerce since it involves the solicitation of students in one State by local agents who are to collect and forward the fees and systematic intercourse by correspondence between the company and its students wherever situated and also the interstate transportation of books, papers, etc. This mode of instruction, the Court said:

"involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing, and in respect of which he is entitled from time to time by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different States, particularly when it is in execution of a valid contract between them,—is as much intercourse in the constitutional sense, as intercourse by means of the telegraph".

VIII. (b) (iv) Driving Sheep across State Line

In *Kelley* v. *Rhoads,* 188 U.S. 1, the Supreme Court held that the driving of sheep from one State to another is an interstate commercial transaction,—that it is a proper mode of transportation—and therefore, that a State tax thereupon is an unconstitutional burden upon interstate commerce.

VIII. (b) (v) Transporting Intoxicants for one's use.

In the *United States* v. *Burch,* 226 Fed. 974, the Court held that interstate transportation by a person of intoxicating

liquors for his own personal use and in his own automobile was interstate commerce. In *United States* v. *Hill*, 248 U.S. 420, the liquor was carried on by a private individual and for his own use but it was transported across the State line by a common carrier. Thus, though upon his own person, it was, in fact, transported by the common carrier and as such, might more easily be held to be a commodity of interstate commerce.

VIII. (b) (vi) Mere Production is not Commerce

Commerce does not include mere production of goods transferred. In the *United States* v. *E. C. Knight Co.*, 156 U.S. 1, Chief Justice Fuller observed that the fact that the article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. In *Coe* v. *Errol*, 116 U.S. 517, 525, in which the questions before the Supreme Court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the state of Maine were liable to be taxed like other property in the state of New Hampshire. In the judgment it was stated:

"Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the state of their origin to that of their destination."

VIII. (b) (vii) Mere intention to export not Commerce

Mere intention to export articles manufactured does not constitute commerce. In *Kidd* v. *Pearson*, 128 U.S. 1, 20, 21, 22, where the question was discussed whether the right of a state to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the state and that "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The function of commerce is different. The

buying and selling and the transportation incidental thereto constitute commerce," and that therefore it is not commerce.

VIII. (c) Commerce between two Terminals

Very often questions might arise whether the Provincial Legislature or the Federal Legislature can enact a law relating to commerce between two terminals in a province or state, when a part of the route is outside that province or state. It has been held by the United States that in such cases only the Federal Legislature has got that power. Often two portions of a Federated State might be separated by a slice of territory of the provinces. In such a case, only the Federal Legislature can legislate to regulate the traffic between that part of the province and the two portions of the Federated State. In *Missouri Pac. R. Co.* v. *Stroud,* 226 U.S. 464, it was held that a state law was inapplicable where the usual route of transportation to the intended destination was partly outside the state. In *Western Union Telegraph Co.* v. *Speight,* 254 U.S. 7, the transmission of a telegram between two points in the same state was held to be interstate in character, so as to prevent the application to it of a state law, when enroute, it passes outside the state.

VIII. (d) Freedom of Trade between the Constituent Units

Absolute freedom of trade between the various constituent units of the Federation are allowed under S. 297 of the Government of India Act. From the fact that "Trade and commerce" are entered in the Provincial list, or from the fact that the Provinces are given the right to regulate the production and distribution and supply of certain commodities, the Provincial Legislature or Executive cannot restrict or prohibit the entry into or export from that province of such goods; nor can it impose any tax or duty on similar goods, manufactured in another province and thus favour its own goods; nor can it by such duty or tax on goods manufactured in one province favour similar goods manufactured in another province. Imposition of such duty or tax is invalid and will be declared as such by the Federal Court.

[END OF VOL. II.]